No. 15665

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN A. MERZ and CHARLES L. BRAY, doing business as All-Jersey Dairy,

Appellants,

vs.

SUNNYBROOK FARMS MILK AND ICE CREAM CO., INC., a corporation and POLAR PIE ICE CREAM CORPORATION,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court for the District of Oregon

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AUTHORITIES

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SUPPLEMENTAL STATEMENT OF CASE

The appellees are milk and ice cream processors and distributors: both companies operating in the same plant in Portland, Oregon, for a period of 25 years (R. II 209) under the same management. They distribute and sell their milk and ice cream products in the greater Portland area and in Vancouver, Washington, in their own trucks.

On June 23, 1954, they entered into a written contract (Def. Ex. 1) with appellants to sell them all their required milk and ice cream products for their business in the Cities of Kelso and Longview, Washington. Appellants are known in the trade as non-processing distributors or milk peddlers. The written contract of June 23, 1954, sets forth the full agreement between plaintiffs and defendants. By said agreement the plaintiffs agreed to assist in securing an adequate supply of milk for their sales and in doing this they secured certain milk producers or milk shippers and picked the farmers' raw milk up and delivered it to the defendants' plant in Portland, Oregon, for processing, where they, in turn, picked up their processed supply of milk and returned it for distribution to Kelso-Longview, Washington.

Until the decision in the case of *State ex rel Safeway vs. Omdahl,* 37 Wash. 2d 733, 225 P.2d 1065, the State of Washington Department of Agriculture refused to license Portland dairies or allow them to do business in the State of Washington in competition with Washington dairies (R. II 96, 97). Plaintiffs, through their contract with defendants, were one of the first distributors to sell Oregon processed milk in Kelso, Longview, Washington, and the only dairy at that time with half-gallon cartons which allowed sale at a favorable or lesser competitive price.

Cowlitz County, in which the Cities of Kelso-Longview, Washington, are located, had a separate milk sanitarian operating separately from the Washington State Department of Agriculture (R. II 68, 69).

Milk in the State of Washington at that time was defined by Washington Laws of 1949, Chapter 168, Section 21, R.C.W. 15.32.180, to be:

> "The whole unadulterated lacteal secretions from cows or goats containing not less than 8% of milk solids exclusive of fat and not less than 3.25% of milk fat, and not obtained within 10 days before parturition or 7 days thereafter. . . ."

(R. 11 90, 91, 32). The State of Washington amended its definition of milk, effective June 10, 1955, to define milk containing not less than 8.25% of milk solids, exclusive of fat, and not less than 3.50% of milk fat.

Cowlitz County attempted to adopt an ordinance or county code requiring milk sold in that county to be not less than 3.6% butterfat (R. II 84, 86).

On April 28, 1955, a criminal complaint was issued out of the Justice Court of Cowlitz County, Washington, on the complaint of the county milk sanitarian Joe L. Walker against the plaintiffs charging them with the crime of the sale of adulterated milk by having in their possession, with intent to sell, milk containing less than 3.6% of milk fat (R. I 17, 18). The matter came on for trial on June 6, 1955, and the court held that the county ordinance was invalid, because there had been no legal publication or public hearing prior to the adoption of said purported county ordinance, as required by state law, and also, that it was in conflict with the State Fluid Milk Act, Washington Laws 1949, Chapter 168, which define milk as containing not less than 3.25% butterfat (R. II 85 and R. II 17). The criminal complaint against the plaintiffs was dismissed by order of

the court (Pl. Exs. 15-A and 15-B). The plaintiffs received unfavorable publicity by reason of the criminal complaint and attempted prosecution and, in their evidence, claim that their business suffered and declined as a result of it.

However, about this same time or shortly after the prosecution, Arden Farms and Carnation Milk Company, two other competitive milk companies with the half-gallon carton began doing business in the Kelso-Longview area (R. II 97).

Also the milk shippers or producers that plaintiffs had obtained for their supply of milk ceased shipping their milk through plaintiffs to defendants' plant for processing and started selling their milk in gallon jugs, which they had bottled and processed at another milk plant in the State of Washington on the Kelso-Longview retail market directly in competition with plaintiffs' milk (R. II 95 and R. II 118). In August, 1955, the plaintiffs, contrary to their agreement with defendants, began buying some of their supply of milk from Valley Farms, a competitive milk plant situated at Vancouver, Washington (R. II 119).

Also between March and October, 1955, the plaintiffs failed to make payment to defendants for their milk and ice cream as provided in the contract (Def. Exs. 6, 7 and 8), and on October 16, 1955, they owed defendants the sum of $5,820.59 for milk and $649.20 for ice cream, and it was necessary for defendants to bring action against the plaintiffs to collect these sums of money (R. II 124, 125 and R. I 25).

On November 17, 1955, plaintiffs ceased purchasing any of their milk and ice cream products from defendants and begin purchasing their milk and ice cream from Arden Farms, competitor of defendants (R. II 124), and on December 14, 1955, filed the above entitled civil suit against the defendants.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point I

> "The court erred in finding that defendants had performed their contract and in failing to find that defendants had breached their contract by furnishing substandard and misbranded milk."

While the written contract of June 23, 1954, does not provide how the milk cartons will be labeled or what percentage of butterfat will be in the milk furnished, there is no quarrel with plaintiffs' contention that there is an implied warranty that the milk and ice cream and other products sold would be merchantable and fit for the purpose intended.

It is appellees-defendants' contention that the milk and ice cream and other products furnished to plaintiffs-appellants over the 17-2/3 months period of the 36 month contract did comply with this warranty of fitness and did comply with the public health and milk laws of the States of Washington and Oregon.

Of all the butterfat tests run on plaintiffs' milk at the request of the Cowlitz County Milk Sanitarian, Mr.

Walker, only one or two appears to be below the 3.25% butterfat requirement of the State of Washington prior to June 10, 1955 (R. II 53, 82, 83, 99). There is no evidence that there was any excessive bacteria count or that the ice cream or other products were in any way defective. In fact, the same month in which the trial was had on the criminal complaint was the largest month of sales of ice cream by plaintiffs during the 17-2/3 months they received their supply under the written contract (R. II 198, 199).

There is no question but what the Cowlitz County Sanitarian, Mr. Walker, was taking more samples and tests of plaintiffs' milk than other competitive dairies with plants located in Kelso-Longview. Judge Solomon in his oral opinion (R. I 46, 47) stated:

> "It seems to me that in this particular case there were quite a few inspections made of the milk of the plaintiffs, and I think that Mr. Walker was particularly vigilant about watching for Oregon milk in this particular instance."

The Sanitary Agent, Mr. Walker, testified in answer to a question as follows:

> " . . . or I was going to jerk his permit, and he could either sell milk that met the standard in Cowlitz County or he will be ruled out, and he didn't seem to be able to get it from Sunnybrook."

The milk plant of Sunnybrook was inspected by the Oregon State Department of Agriculture and by the Public Health and Milk Department of the City of Portland, all subject to the requirements of the United States Public Health Code (R. II 282-285 and

R. II 289) (Def. Ex. 12). These examinations made by the Oregon Department of Agriculture and the Health Department of the City of Portland on their own behalf and on behalf of the State of Washington found the milk plant and its products to be sanitary and meeting the requirements of both the State of Washington and the State of Oregon. The plant or none of its products were ever degraded. As to the two butterfat tests above referred to that were found to be below the minimum butterfat requirement of the laws of the State of Washington, this should be stated. All samples of milk for the purpose of testing butterfat under both the laws of the State of Oregon and the State of Washington are taken pursuant to the United States Public Health Service Milk Code.

Sec. 15 of the 1949 Fluid Milk Act (R.C.W. 15.36.-540) is as follows:

> "Sec. 15. Save as in this Act provided, this law shall be enforced by the Director of Agriculture in accordance with the interpretations contained in the *United States Public Health Service Milk Code* as from time to time adopted and amended."

The United States Public Health Service Milk Code is as follows:

> "SECTION 6. THE EXAMINATION OF MILK AND MILK PRODUCTS.
>
> "During each grading period at least four samples of milk and cream from each dairy farm and each milk plant shall be taken on separate days and examined by the health officer. Samples of other milk products may be taken and examined by the health officer as often as he deems necessary. Sam-

ples of milk and milk products from stores, cafes, soda fountains, restaurants, and other places where milk or milk products are sold shall be examined as often as the health officer may require. Bacterial plate counts and direct microscopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Association. Examinations may include such other chemical and physical determinations as the health officer may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists. Samples may be taken by the health officer at any time prior to the final delivery of the milk or milk products. All proprietors of stores, cafes, restaurants, soda fountains and other similar places shall furnish the health officer, upon his request, with the names of all distributors from whom their milk and milk products are obtained. Bio-assays of the vitamin D content of vitamin D milk shall be made when required by the health officer in a laboratory approved by him for such examinations.

"Whenever the average bacterial count, the average reduction time, or the average colling temperature falls beyond the limit for the grade then held, the health officer shall send written notice thereof to the person concerned, and shall take an additional sample, but not before the lapse of 3 days for determining a new average in accordance with section 1 (S.). Violation of the grade requirement by the new average or by any subsequent average during the remainder of the current grading period shall call for immediate degrading or suspension of the permit, unless the last individual result is within the grade limit."

Pertinent parts of the *interpretation* of the said Section 6 of the *United States Public Health Service Milk Code* contain the following:

"Samples upon which grades are to be based should be taken from supplies while they are still in the possession of the dairyman. Any other practice would be unfair to the dairyman, as once the milk is out of his possession it is beyond his control. For this reason Section 6 contains the sentence requiring that milk samples must be taken while in the possession of the dairyman.

"The last paragraph of section 6 provides for degrading or suspension of the permit upon violation of the bacterial or cooling requirement. The intent is to avoid punishment until the dairyman has been notified and has been given an opportunity to correct the condition. . . .

"The above constitutes the public-health reason for grading milk partly on the basis of the bacterial count or the reductase test.

"The collection of milk samples.—In order to yield significant results milk samples must be collected so as to represent the condition of the milk when reaching the consumer or milk plant receiving station. Therefore they may not be taken at the dairy, but must be collected either from the delivery vehicles or at the milk plant or its country receiving stations. . . .

"In case of bottled milk, a pint or quart bottle shall be taken at random from the truck by the inspector, and the top covered with paraffined or parchment paper so as to assure the dairyman that the milk will not be contaminated en route to the laboratory by the hands of the inspector or by the ice in the sample case. The sample tag must be filled out by the inspector at the time the sample is taken, and the wire twisted tightly about the neck of the bottle, thus binding tight the paper cover.

"When samples are to be shipped to a laboratory located in another city (a central or branch State laboratory) the same procedure must be

followed, the milk being transferred to the shipping-case containers, the bottles shall first be thoroughly shaken and the cap and lip carefully swabbed with alcohol or chlorine solution. The milk shall then be carefully poured into the shipping bottle, the tag being immediately transferred, so as to avoid mixing of tags." (Italics ours.)

Washington Laws of 1907, Ch. 234, Sec. 11 (R.C.W. 15.32.540).

"Right of entry—Samples—Duplicate to owner. The director and his depulties may enter any place or building where he has reason to believe that a dairy product or imitation thereof is kept, made, sold, or offered for sale, and open any receptacle containing or supposed to contain any such article, and examine the contents thereof and he may take the article or a sample thereof for analysis. *If the person from whom the sample is taken requests him to do so, he shall at the same time and in his presence seal up two samples of the article taken, one of which shall be for examination or analysis, and the other taken shall be delivered to the person from whom the article is taken.*" (Italics ours.)

There is no evidence that Mr. Walker or his assistants made a sample of the milk taken for inspection available to the defendants or the plaintiffs and it is an admitted fact that one of the low tests was taken from a half-pint of milk rather than from a pint or quart bottle as required by the United States Public Health Service Milk Code (R. II 103 and R. II 84). The reason for this prohibition is that in a small container such as a half-pint, a larger percentage of the butterfat, as compared with milk solids, has a tendency to cling to the container, thus reducing the butterfat test of the total contents of the small container.

APPELLEES' CONTENTION TO POINT I

For the above reasons appellees contend that their products furnished to the appellants under the written contract of June 23, 1954, were merchantable and fit for the purpose intended and met the qualifications of the laws of the State of Oregon and the State of Washington and any slight variation therefrom was not the proximate cause of any damages which the appellants might have suffered.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point II

> "Where acts or omissions occur in breach of a duty and criminal prosecution of the person to whom the duty is owed may reasonably be expected to follow, such criminal prosecution, if it occurs, is the proximate result of the breach."

The above is not an accurate statement of the point of law which counsel for appellants states in his brief at page 14 "is the crux of this appeal". The criminal complaint in this case was not for the violation or omission of a breach of duty of a valid law. In the present case a criminal charge was filed on the complaint of the Cowlitz County Sanitary Milk Agent for " . . . the crime of sale of adulterated milk as follows, to wit: that said John Merz and Charles Bray then and there being, did then and there wilfully and unlawfully offer for sale and have in their possession with intent to sell, adulterated milk, to wit: milk containing less than

3.6% milk fat;" based on the Cowlitz County Milk Code requiring milk to be not less than 3.6% milk fat. There is no breach of a duty if there is no valid law establishing a duty.

At the trial on June 6, 1955, the court held (Pl. Exs. 15-A and 15-B) the ordinance on which the criminal complaints were based to be invalid because there had been no public hearing or notice of a hearing prior to the adoption of the ordinance and also that it was in contravention of the Washington State Fluid Milk Act (Washington Laws 1949, Chap. 168), which defined and required milk to be not less than 3.25% milk fat.

In the present case the criminal prosecution was based on an ordinance found to be invalid and, therefore, there was no breach of a duty.

At the trial (R. II 142-145) and in their brief (pages 10, 11) appellants relied upon *Segal v. Horwitz Bros.,* 32 Ohio App. 1, 167 N.E. 406. In the Segal case the attempted prosecution was under *a valid law* making it a crime to knowingly *receive stolen property*. There is no question but what the criminal complaint was brought under a valid statute making it a crime.

In the Cowlitz County case against the appellants the criminal complaint was based on an ordinance found by the court and as shown by the record in this court *"to be invalid."*

In a trial on the merits in a criminal case based on a valid statute the question of probable cause is not passed on, and it does not necessarily follow that failure to convict would show a lack of probable cause. Failure

to convict could depend on many contingencies other than probable cause.

However, in the Cowlitz County case against appellants the court held the statute to be invalid, an entirely different situation from the Segal case.

The general rule is that an invalid or unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to setle just as it would be had the statute not been enacted.

Since an unconstitutional or invalid law is void, the general principles follow that it imposes no duties and confers no rights. No one is bound to obey an unconstitutional or invalid law and no courts are bound to enforce it. Quoted in effect from 11 Am. Jur., Constitutional Law, Par. 148, pages 827-829.

When the statute or charter provides a mode of procedure for municipal councils designed to protect the citizens and taxpayers from hasty and ill considered legislation or to enforce publicity in the actions of the council, the mode of procedure thus prescribed must be strictly observed. Such statutory provisions constitute conditions precedent, and unless an ordinance or resolution is adopted in compliance with the conditions and directions thus prescribed, *it will have no force.* 37 Am. Jur., Municipal Corporations, par. 144, page 756. In other words, the ordinance which Cowlitz County attempted to pass requiring milk to have 3.6% butterfat had no force.

APPELLEES' CONTENTION TO POINT II

The intervening act of the County Court adopting an invalid ordinance and the intervening act of an overzealous County Sanitary Agent bringing a criminal complaint to prosecute plaintiffs under an invalid ordinance was the probable cause of any damages which the plaintiffs might have sustained by reason of the unfavorable publicity which they received as a result of the criminal charge and the trial.

In each of the cases relied upon in plaintiffs' brief under Point II, the original complaint was brought under a valid law and so, of course, the question of probable cause was a matter to be determined by the court in each of the actions for damages. In not one of the cases cited was the original action brought under an invalid or unconstiutional law.

Judge Solomon in his oral opinion (R. I 47) stated:

> "I don't think that I can speculate upon what might have happened had the plaintiff been prosecuted under the state law because, in fact, they were prosecuted under a county law which the court there held was invalid."

This is surely correct because there was no criminal complaint brought under the valid Washington Fluid Milk Act and it is doubted, from the method of taking samples, if any such a complaint could have been brought.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point III

> "Difficulty of ascertainment is not a bar to the recovery of damages and if the fact that damages have been sustained is established the court will adopt a method for fixing the amount."

The problem of assessing damages is a moot question unless the court first finds that the appellees are liable for appellants having been prosecuted under an ordinance found to have been invalid. The record is almost non-existent as to any evidence that appellants might have suffered any damages from any cause other than the result of the criminal charge under the invalid ordinance. Mrs. Bray, the wife of one of the plaintiffs, testified in response to the question "Did your business increase considerably when you went to Arden Farms?" "A. No, our reputation was too badly damaged to increase." (R. 11 181). One of the other witnesses, Neva Peterson, stated in response to the question "What was unsatisfactory about it?" "A. I never did find any cream on it." In response to a course of questions, she stated "I couldn't see some cream and there never was no cream on it. (R. II 176). But the evidence showed that the all jersey milk was only bottled in homogenized milk, where there is no visible cream line and all the fat nodules are homogenized into the milk solids. Judge Solomon in his oral opinion (R. I 49) stated:

"And I say even if the plaintiffs, in fact, lost

money beginning in May or June, 1955, it was the result of the prosecution and not because of any of these other matters."

From a reading of the evidence (R. II 94, 97) it is clear that if plaintiffs did suffer loss of business, it certainly could be contributed to additional competition or cut prices and competition on the one gallon jugs of milk from the farmers originally shipping milk through them and from Carnation Milk Company and Arden Farms both coming on the same Kelso-Longview market with the half gallon milk carton.

APPELLEES' CONTENTION TO POINT III

15 Am. Jur., Damages, par. 18, page 408:

"It is also fundamental that the damages which the plaintiff is entitled to recover in a civil action for damages are, in the absence of any statutory modification of the rule, such only as are natural and probable consequences of the wrongful act or breach of contract. The law of damages is not concerned with the effect of remote causes, but only with those consequences of which the act complained of is the natural and proximate cause—that is, those which naturally and proximately flow from the original wrongful act."

15 Am. Jur., Damages, par. 52, page 451:

" . . . from the breach of the contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it, and the pronouncement in that case has been generally accepted as an accurate statement of the law of the subject. Thus, the rule in contract actions is to be distinguished from the

> rule in tort actions, under which damages may be recovered for all injuries which proximately follow whether or not all such injuries could have been anticipated or contemplated."

Two Oregon cases are in point, both of which have been cited by appellants in their brief, but appellees feel that they are more properly cited in favor of appellees' position above stated. The first is *Blagen vs. Thompson,* 23 Or. 239. This is a contractual case where the defendants failed to build a road which they had agreed to do and the plaintiffs sue for damages by reason of the breach. At page 248 the court says:

> "The difficulty in the determination of the question thus presented and in like cases, lies not so much in the ascertainment of the law of the subject, as in its application to the facts of the particular case."

At page 253 the court said:

> " . . . It may be difficult for plaintiff to prove with exactness what would have been the value of the land with the contract fulfilled; but such uncertainty does not prevent him from recovering such damages as he may be able to prove. He is only required to give such evidence as the nature of the case will permit bearing upon the nature of his damages and legally tending to prove such value . . . "

In the *Krause vs. Bell Potatoe Chip Company* case, 149 Or. 388, plaintiffs claim a violation of a contract, entered into with defendants, by the defendants when the defendants came out with a new product and cut his commission from 20% to 10% on the new product. The court at page 394 says:

> "The rule that damages, which are uncertain or contingent, cannot be recovered, does not apply to an uncertainty as to the amount of the benefit or gain to be derived from performance of a contract, but to the uncertainty or contingency as to whether there would be any such gain or benefit derived at all: Blagen vs. Thompson, 23 Or. 239, 240 . . . "

Appellees knew that their milk must comply with Washington and Oregon laws pertaining to milk for sale for human consumption, but it certainly was not within the contemplation of the contracting parties that the milk would have to comply with any other law such as the ordinance adopted by Cowlitz County. In fact, there is no definite evidence in the record that appellees knew that there was a Cowlitz County ordinance requiring milk sold in that county to be not less than 3.6% fats, not solid (R. II 86 and R. 11 267-268).

Furthermore, there is not one scintilla of evidence in the record that appellee, Polar Pie Ice Cream Corporation's ice cream products were faulty or ever objected to by appellants or by any of the state or county sanitary inspectors and the ice cream products were certainly not involved in the Cowlitz County criminal prosecution.

Judge Solomon made a finding (R. I 41):

> "That the books and records of the plaintiffs were fragmentary and incomplete and did not accurately reflect the condition of plaintiffs' business at any time during the life of the contract between plaintiffs and defendants and said books and records were of such a nature and condition that the court could not determine with any degree of accuracy the gross business or net loss of the plaintiffs, if any . . . "

In fact, the books of the appellants were so poor and incomplete that they were not received in evidence (R. II 303). The court addressing itself to Mr. Bryson:

> "I want to know something about the question of damages. Did you look at the books and records that have been made available to you?
>
> Mr. Bryson: I understand these are not in evidence. I didn't know they had been received.
>
> The court: No, they have not been received."

(R. 11 304) the court addressing itself to Mr. Leedy:

> "As far as the books are concerned, it is pretty difficult to tell anything from these books.
>
> Mr. Leedy: We will withdraw them."

Certainly it was the plaintiffs' burden to bring before the court evidence of what their damages were. Other than some very general statements by the plaintiffs in their testimony, there is only in the record Plaintiffs' Exhibit No. 11 which purports to be a recap of wholesale monthly sales and it was never tied in to any original records, and Plaintiffs' Exhibits 18-A and 18-B, copies of their 1954-1955 U.S. income tax.

DISCUSSION OF PLAINTIFFS' SPECIFICATIONS OF ERROR

Point IV

> "A party who commits the first breach of a contract cannot recover from the other party for a subsequent failure to perform."

Appellees wish to point out that the appellants were the first to breach the contract, in that:

(a) They failed to make payments as provided under the terms of the contract (Def. Exs. 6, 7 and 8).

(b) They purchased milk from Valley Farms, a competitor of appellees without notifying appellees (R. II 191-194 and R. II 119).

(c) They failed to assist appellees in securing an adequate supply of milk for appellants' and appellees' sales which would be handled through appellees' Washington pool, as provided on page 2 of the contract (R. II 118).

CONCLUSION

It is submitted that Judge Solomon made the only decision that was possible under the law and facts following the trial in this case. The whole tenor of the testimony shows that, if appellants suffered any damages, it was in the summer of 1955 following the June, 1955, trial of appellants under an invalid ordinance. Also, about this same time the economic conditions on the Kelso-Longview market changed completely. The

farmers who were shipping milk through the appellants withdrew their milk and started selling it themselves in gallon glass jugs at a reduced price in competition with appellants. Also two large dairies, Carnation Milk Company and Arden Farms, both came on the Kelso-Longview market with a competitive half gallon paper milk carton. Under these circumstances, it is submitted that the appellants could not have remained in business regardless of any conditions that might have existed between appellants and appellees under the terms of the written contract of June 23, 1954.

Respectfully submitted,

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